United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

76-2157

To be argued by
M. HATCHER NORRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2157

JOHN ROTHWELL,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2157

JOHN ROTHWELL,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from an order of the United States District Court for the District of Connecticut, T. Emmet Clarie, Chief Judge, denying and dismissing appellant's motion to correct sentence pursuant to Title 18, United States Code, Section 2255. Appellant alleged that his sentence should be corrected because parole guidelines, promulgated subsequent to his sentence, were utilized by the Parole Board and, thereby, frustrated the intentions of the sentencing judge who sentenced him pursuant to Title 18, United States Code, Section 4208(a)(2). On October 1, 1976, the District Court dismissed appellant's action for lack of jurisdiction and indicated that even if the Court had jurisdiction there was no sentencing error. This appeal followed the Court's denial of a motion to reconsider its October 1st ruling.

Statutes Involved

Title 28, United States Code, Section 2255, Federal custody; remedies on motion attacking sentence.

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Title 28, United States Code, Section 2241:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State Court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district for hearing and determination.

Federal Rules of Criminal Procedure Rule 35

The court may correct an illegal sentence at any time and may correct a sentence imposed in

an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

Federal Rules of Criminal Procedure Rule 45

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request thereof is made before the expiration of the period originally prescribed or as extended by a preivous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the faliure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.

Questions Presented

1. Did the District Court have jurisdiction to entertain appellant's motion to correct sentence?

2. Did the application of parole guidelines, promulgated subsequent to appellant's sentence, frustrate the intentions of the sentencing judge who sentenced the appellant pursuant to Title 18, United States Code, Section 4208(a)(2)?

3. Is Title 18, United States Code, Section 4208(a)-(2) an early consideration provision or an early release provision?

4. Does the application of parole guidelines, promulgated subsequent to appellant's sentencing, mandate resentencing *per se?*

Statement of the Facts

The appellant, a federal prisoner incarcerated in Montgomery, Pennsylvania, was found guilty of violations of Title 21, United States Code, Sections 841 and 846 after a trial by jury. On April 3, 1973, Chief United States District Court Judge T. Emmet Claire sentenced Rothwell to serve four years on each of three counts, said counts to be served concurrently, pursuant to 18 United States Code, Section 4208(a)(2). Following an appeal to this Court which affirmed appellant's conviction and denial of a writ of certiorari by the United States Supreme Court, appellant entered federal custody on August 28, 1975. On February 9, 1976, Rothwell was afforded an in-person parole hearing before the Hearing Examiner Panel at Allenwood, Pennsylvania. Rothwell was denied parole in a notice sent on February 13, 1976. No appeal was thereafter filed through administrative channels. Rothwell's parole hearing was continued to a time equal to one-third of his sentence. On July 29, 1976, Rothwell filed a motion to correct sentence in United States District Court, District of Connecticut. Chief Judge Clarie denied and dismissed Rothwell's motion on October 1, 1976 and a motion to reconsider was denied on October 12, 1976. This appeal followed.

I.

The District Court lacked jurisdiction to entertain appellant's motion to correct sentence pursuant to Title 28, United States Code, Section 2255.

A. The appellant's action was in fact a motion under Rule 35, Fed. R. Crim. P. under the guise of a habeas corpus motion and, therefore, untimely.

Rothwell's action in District Court prayed for relief in the form of a "correction" of his sentence from four years to one year. Although Rothwell cited Title 28, U.S.C. § 2255 as granting the District Court jurisdiction over his motion, his motion was, in fact, nothing more than a Rule 35 motion under the heading of 28 U.S.C. § 2255.

The order issued upon denial of Rothwell's writ of certiorari to the Supreme Court was entered on February 9, 1974.[1] The record discloses that Rothwell failed to file a timely motion for reduction or correction of sentence within the following 120 days as required by Rule 35, Fed.R.Crim.P. This time limit is jurisdictional and once the 120 day period had expired the District Court was without power to reduce a valid sentence. *United States* v. *Regan*, 503 F.2d 234 (8th Cir. 1974), *cert. denied sub nom. Tocco* v. *United States*, 420 U.S. 1006 (1975); *United States* v. *United States District Court*, 509 F.2d 1352 (9th Cir. 1975), *cert. denied sub nom. Roselli* v. *United States*, 421 U.S. 962 (1975); and *United States* v. *Mehrtens*, 494 F.2d 1172 (5th Cir 1974). The time limitation for reduction or correction of sentence is to be

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[1] *Rothwell* v. *United States*, 415 U.S. 924 (1974).

strictly enforced and the District Court was not empowered to extend that time limitation.[2] Rothwell's reliance on *United States* v. *Slutsky* found jurisdiction solely on the basis of a timely motion under Rule 35, Fed.R.Cirm.P. Any question concerning the Court's finding with regard to jurisdiction was dispelled when the Court stated:

> And when, as here, there has been a timely motion for reduction of sentence and the mistake is easily rectified by providing for resentencing, the interests of justice mandate such a procedure. *Id.* at 1229.

Rothwell's citation of 28 U.S.C. § 2255 is not sufficient to disguise the Rule 35 character of his motion. Rothwell requested relief from the District Court in the form of a reduction or correction of his sentence from one to four years. Rothwell failed to allege any of the essential elements that would have provided the District Court jurisdiction under § 2255. The District Court was faced with a motion which alleged a wrongful denial of parole and requested relief in the form of a "correction" of sentence. For the District Court to have accepted jurisdiction it would have had to contravene the basic purpose for the time limitation of Rule 35.

> The time limitation appears to have as its dual purpose the protection of the district court from continuing and successive importunities *and to assure that the district court's power to reduce a sentence will not be misused as a substitute for the consideration of parole by the Parole Board. United States* v. *Stollings*, 516 F.2d 1287, 1289 (4th Cir. 1975) (emphasis added).

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[2] See Rule 45(b), Fed. R. Crim. P.; *United States* v. *Norton*, 539 F.2d 1082, 1083 (5th Cir. 1976).

B. The sentencing court does not have jurisdiction to review the execution of a sentence unless the sentence is being served in the sentencing district.

Rothwell is a federal prisoner incarcerated at the Allenwood Federal Prison Camp, Montgomery, Pennsylvania and was incarcerated there at the time of filing his motion to correct sentence. Although the District Court found that jurisdiction was lacking under Rule 35, the government submits that the Court also lacked jurisdiction to entertain the petition as a writ of habeas corpus.

The government respectfully submits that since neither Rothwell nor his custodian were within territorial jurisdiction of the District Court, that Court had no jurisdiction to entertain Rothwell's petition as a writ of habeas corpus. *Ahrens* v. *Clark*, 335 U.S. 188 (1948);[3] *United States ex rel. Rudick* v. *Laird*, 412 F.2d 16 (2d Cir. 1969), *cert. denied*, 396 U.S. 918 (1969); *Ledesma* v. *United States*, 445 F.2d 1323 (5th Cir. 1971); *Filion* v. *United States*, 375 F.Supp. 721 (D.C.N.Y. 1974); *United States* v. *Isaacs*, 392 F.Supp. 597 (N.D.Ill. 1975).

In the case of *United States* v. *DiRusso*, 535 F.2d 673 (1st Cir. 1976), the First Circuit Court of Appeals addressed an issue quite similar to that raised in the government's brief

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[3] The government recognizes that the Supreme Court somewhat modified its *Ahrens* decision in *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973). However, the Supreme Court in *Braden* fashioned an exception to the general rule where application of the *Ahrens* rule will deprive a prisoner a forum in which to assert his petition; such an inability to find a forum is not present in the case at bar.

> The threshold legal question is: does the sentencing court have the jurisdiction under 28 U.S.C. § 2255, when the prisoner is incarcerated in another district, to consider altering the sentence because the application of the guidelines is not what the court expected in imposing the sentence. *Id.*

In *DiRusso*, as in the instant case, the petitioner and his custodian were located outside the territorial jurisdiction of the District Court in which the writ of habeas corpus was filed. The Court of Appeals found that an action attacking the application of parole guidelines to a sentence is an attack on the execution, rather than the imposition or illegality of the sentence. Such a distinction directly affects the Court's jurisdiction. Section 2255 does not grant jurisdiction over a post-conviction claim attacking the execution, rather than the imposition or illegality of the sentence. *Id.* at 674. An action under Title 28, United States Code, Section 2241 is the proper vehicle to raise a claim attacking the execution of a sentence. *See, Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *United States* v. *Clinkenbeard*, 542 F.2d 59 (8th Cir. 1976); *Gravink* v. *United States*, No. 76-1938 (8th Cir., filed February 17, 1977); *See, e.g., Grasso* v. *Norton*, 520 F.2d 27 (2d Cir. 1975).

This Court recently refused to stretch habeas corpus jurisdiction in *Billiteri* v. *United States Board of Parole*, 541 F.2d 938 (2d Cir. 1976). This Court was faced with an appeal by the United States Board of Parole (now the United States Parole Commission) from an order of the United States District Court for the Western District of New York directing the Parole Board to release Billiteri on parole. Billiteri was at that time a prisoner at the Federal Penitentiary at Lewisburg, Pennsylvania. In addressing the issue of jurisdiction this Court noted that jurisdictional power was predicated on jurisdiction over the petitioner's custodian.

> Title 28 U.S.C. § 2242 provides that an application for a writ of habeas corpus shall 'name . . . the person who has custody over' the petitioner, and § 2243 provides that the writ, or order to show cause, 'shall be directed to the person having custody over the person detained.' Despite the willingness of courts in recent years to broaden the concept of 'custody' beyond the simple status of present imprisonment, [citations omitted], it still remains an essential aspect of the habeas corpus writ that it acts 'upon the person who holds [the prisoner] in what is alleged to be unlawful custody. [citation omitted] In order for a court to entertain a habeas corpus action, it must have jurisdiction over the petitioner's custodian. [citations omitted] *Id.* at 948.

This Court dismissed the petition in *Billiteri*, *supra*, for the same defect that is present in the instant case. Rothwell, who is incarcerated outside the District of Connecticut, cannot claim that the District Court in Connecticut has jurisdiction over himself or the warden of Allenwood Federal Prison Camp in Montgomery, Pennsylvania. Furthermore, Rothwell made no showing of inability to bring his petition in the district of his incarceration. Rothwell chose the wrong forum in which to bring this action and the District Court was without jurisdiction to entertain this attack on the execution of his sentence.

C. Rothwell failed to exhaust his administrative remedies.

Even if the District Court below has jurisdiction over Rothwell's petition, the petition should have been dismissed for his failure to exhaust the administrative remedies available under 28 C.F.R. §§ 2.25 and 2.26

Talerico v. *Warden*, 391 F.Supp. 193 (M.D.Pa. 1975); *Soyka* v. *Alldredge*, 481 F.2d 303 (3rd Cir. 1973); *Pope* v. *Sigler*, 542 F.2d 460 (8th Cir. 1976); *Mason* v. *Ciccone*, 531 F.2d 867 (8th Cir. 1976); *Willis* v. *Ciccone*, 506 F.2d 1011 (8th Cir. 1974).

On February 9, 1976, Rothwell personally appeared before the Hearing Examiner Panel at Allenwood Prison. He was advised that the Hearing Examiner Panel would make a decision regarding his parole. The Panel also advised Rothwell that he had a right to appeal the Regional Director's decision to the National Appellate Board. The time limits for appeal were explained and he was informed that his case worker would provide him with the necessary appeal forms. On February 13, 1976 Rothwell was sent a copy of the Hearing Examiner Panel's Notice of Action.[4] This form also advised him of his available administrative remedies.[5] Rothwell has failed to file any appeal to the decision of the Hearing Examiner Panel of which he now complains.

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[4] Parole Form H-7(a) (Rev. June 1974).

[5] The form states:

Appeals procedure: You have a right to appeal a decision as shown below. Forms for that purpose may be obtained from your caseworker, and must be filed with the Chief, Classification and Parole, (or his equivalent) within thirty days of the date this Notice was sent.

A. *Decision of a Hearing Examiner Panel.* Appeal may be made to the Regional Director.

B. *Decision of the National Appellate Board referred to it for reconsideration.* Appeal may be made to the Regional Director.

C. *Decision of the Regional Director.* Appeal may be made to the National Appellate Board.

D. *Decision of Regional Directors in cases where they assumed original jurisdiction.* Appeal may be made to the National Appellate Board.

The case most closely in point is *Talerico* v. *Warden*, *supra*. In that case the petitioner, having been sentenced in 1973 under the provisions of 18 U.S.C. § 4208(a)(2), sought a writ of habeas corpus alleging that the Board of Parole denied his release on parole unlawfully. The petitioner did appeal the initial decision to the Regional Director within the proscribed time limitations, but failed to appeal the decision of the Regional Director to the National Appellate Board. The Court, in dismissing for failure to exhaust administrative remedies, discussed the rationale behind the exhaustion requirement.

> The basic premises underlying the exhaustion requirement are that (1) judicial time and effort may be conserved because the agency might grant the relief sought; (2) judicial review may be facilitated by allowing the agency to develop a factual record and apply its expertise; and (3) administrative autonomy requires that an agency be given an opportunity to correct its own errors. *Id.* at 195.

In the instant case Rothwell contends that the Hearing Examiner Panel erred in denying him parole by only considering the "Guidelines for Decisionmaking".[6] Since the Board of Parole provides that the hearing panel may render decisions above or below the guideline range using many consideration,[7] this matter should have properly been brought to the attention of the Regional Director on appeal. Rothwell failed to provide the Board of Parole the opportunity to correct any errors that may have been committed. This failure to avail himself of administra-

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[6] 28 C.F.R. § 2.20 (1974), *as amended*, 40 Fed. Reg. 10976 (March 10, 1975).

[7] See, 28 C.F.R. § 2.19 (1974), *as amended*, 40 Fed. Reg. 10975 (March 10, 1975).

tive remedies provided the District Court with grounds to dismiss Rothwell's motion to correct sentence.

II.

The intentions of the sentencing judge were not frustrated by the application of parole guidelines to appellant's "A-2" sentence.

Rothwell asks this Court to vacate the District Court's ruling and remand for further proceedings. Brief of Appellant at 5-6. Rothwell appears to contend that had the Court below found jurisdiction, he would have received the requested relief. This premise is unsupported, however, by the Ruling on Petitioner's Motion to Correct Sentence (Appellee's Appendix) wherein Rothwell's sentencing judge states that in his choice of 18 U.S.C. § 4208(a)(2) he did not contemplate second guesses on the exercise of this delegated discretion. Chief Judge Clarie makes it perfectly clear that the application of parole guidelines to Rothwell's sentence did not frustrate the intentions of the sentencing judge. Therefore, the government submits that even if the court below had jurisdiction over this case, remand would serve no purpose because the District Court has already addressed appellant's substantive claims and rejected them.

The District Court made clear its intentions at time of sentencing when it stated: "When this Court imposed the § 4208(a)(2) sentence, it intended to give to the Parole Board (now the Parole Commission) complete discretion under the law to decide, when the petitioner should be released".[8] The use of this sentencing provision

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[8] Appellee's Appendix at

placed maximum discretion with regard to paroling decisions with the Parole Board.

Prior to the adoption of the paroling policy guidelines, individual paroling decisions were made entirely on a case by case basis without reference to the precedents of previous cases or other explicit standards. For several years, the federal and state parole boards had been criticized for this failure to adopt formalized standards for parole decisionmaking. The report of the National Advisory Commission on Criminal Justice Standards and Goals summarized this shortcoming as follows:

> The absence of written criteria by which decisions are made constitutes a major failing in virtually every parole jurisdiction. Some agencies issue statements purporting to be criteria, but they usually are so general as to be meaningless. The sound use of discretion and ultimate accountability rests largely in making visible the criteria used in forming judgments. Parole Boards must free themselves from total concern with case by case decision-making and attend to articulation of the actual policies that govern the decision making process. National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Reports Corrections*, 418 (1971).

The U. S. Board of Parole in particular was sharply criticized for its failure to articulate explicit paroling guidelines:

> An outstanding example of completely unstructured discretionary power that can and should be at least partially structured is the United States Parole Board. In granting or denying parole, the Board makes no attempt to structure its discretionary power through rules, policy statements, or guide-

> lines; it does not structure through statements of findings and reasons; it has no system of precedents . . . . Davis, *Discretionary Justice*, 126 (1969).

A similar proposal for the adoption of paroling guidelines was made by the Administrative Conference of the United States:

> The United States Board of Parole should formulate general standards to govern the grant, deferral or denial of parole. This articulation of standards can appropriately be deferred until it can reflect both results of the pending computer study of parole decisions and accumulation of a useful number of recent decisions. Administrative Conference Recommendation 34: Procedures of the United States Board of Parole (adopted June 9, 1972) 25 *Ad. L. Rev.*, 531 (1971).

In *Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925 (2d Cir., 1974),[9] this Court held that due process required a statement of reasons for parole denial and strongly suggested the adoption of guidelines to assure fair, rational and nondiscretionary parole decisions:

> The normal, indeed logical, method to achieve this objective is for the administrative body which is vested with such broad powers to formulate and publish rules and criteria that would provide precise guidelines for the responsible exercise of its discretion. *Id.* at 929.

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[9] The Supreme Court granted certiorari on November 18, 1974 and vacated the judgment and remanded with instructions to dismiss case as moot. *Regan, Chairman, New York State Board of Parole, et al* v. *Johnson*, 419 U.S. 1015 (1974).

Indeed, this Court in *Johnson* expressed the hope that the requirement of reasons for parole decisions would develop into a body of precedent to guide future parole decisions:

> Hopefully a body of rules, principles and precedents would be established by the Board; see Davis, *Discretionary Justice.* 106-107 (1969); *Johnson* at 933.

At the urging of these commentators and court decisions, and in response to this need for developing explicit policies standards, the United States Board of Parole, in cooperation with a National Council on Crime and Delinquency research project undertook an analysis of its previous case by case paroling decisions in order to identify the policy trends implicit in those decisions.[10] The patterns of the Board's past decisions were tabulated for various combinations of offense severity and parole prognosis (risk of recidivism). The later items were expressed in terms of a statistical prediction device called the "salient factor score". For each combination of offense severity and parole prognosis, the tables set out a range of months which was the average time served for cases with those characteristics. In October, 1972, these guideline tables were experimentally adopted as a policy model to be followed in making parole decisions in five institutions in the Northeastern part of the country. The Board's hearing examiners were instructed that their recommended decisions should be within these guideline ranges unless they found factors in individual cases which warranted decisions outside the guidelines. Fol-

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[10] For a more complete description of the parole decision making project, see Hoffman and Gottfredson, *Paroling Policy Guidelines: A Matter of Equity,* National Council on Crime and Delinquency Research Center (1973).

lowing favorable response to the experimental period of guideline use, the Board formally adopted the guidelines as national paroling policy and published them in the Federal Register on November 19, 1973. 38 Fed. Reg. 31942 *et seq.* It is clear from the foregoing summary of the development of the guidelines, that the guidelines do not offer the legal effect of a sentence. The guidelines do not change judicially set parole eligibility dates.[11] The earning and crediting of good time is not affected. Furthermore, to the extent that the guidelines are a codification of prior paroling policies, the guidelines serve to promote a continuity of pre-guideline practices.

The sole purpose of the guidelines is to promote consistency in the Parole Board's decision by structuring the exercise of discretion. The Board encourages judicial reference to the guidelines as an aid in understanding the functioning of the parole system. However, to require an accurate prediction of parole disposition by sentencing courts would invite a vast new quantity of post-conviction litigation addressed to claims that the sentencing court wrongly predicted the Board's action or made no prediction at all. Anticipation of such challenges

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[11] Since the Board may parole a prisoner sentenced under 4208(a)(2) at any time, the setting of individual parole "eligibility" dates for such prisoners would unnecessarily complicate the paroling process, requiring separate decisions for "eligibility" and "paroleability". The Board has sought to avoid such confusion by its policy of considering all (a)(2) prisoners to be "eligible" for parole at their initial hearings and at all times thereafter. Thus, the Board's resources are concentrated on the central question of *when* to release an "eligible" prisoner. Furthermore the Board's order that petitioner in this case be continued to a time equal to one third of his sentence does not affect his parole eligibility in any way. Pursuant to 28 C.F.R. Section 2.28 his case may be reopened *at any time* if new information is submitted which warrants a different action.

illustrates the need for adhering to the holding in *Tarlton* v. *Clark*, 441 F.2d 384 (5th Cir. 1971), *cert. denied*, 403 U.S. 934, that "it is not the function of the Courts to review the discretion of the Board in denial of application for parole . . . ." *Id.* at 385.

The sentencing alternative available under 18 U.S.C. Section 4208(a)(2) is designed to reduce sentence disparity by giving the Parole Board a broader range of discretion.

Petitioner's contention that imposition of a sentence under 18 U.S.C. § 4208(a)(2) gives the sentencing court continuing authority to modify the sentence is diametrically opposed to the correct interpretation of that statute. A fair reading of the legislative history of the section reveals that its overriding purpose was the same as the purpose of the paroling guidelines: minimization of disparate prison set terms. Section 4208(a)(2) was passed by Congress in 1958 together with a provision for the establishment of institutes and joint councils on sentencing. Public Law 85-752. A Senate report on this legislation concluded that the indeterminate sentencing scheme of Section 4208(a)(2) would be a method for eliminating such disparities:

> The existence of wide disparities casts doubt upon the evenhandness of justice and discourages a respect for the law. Experience in State Courts has suggested that the most practicable method for smoothing out such disparities lies in a sentencing system which permits the courts to share with the Executive Branch the responsibility for determining how long a prisoner can serve before he can safely be released.
>
> The provisions of the proposed legislation do not embody a softening in criminal penalties. Terms

> served under indeterminate sentences average longer than do terms under the fixed system . . .
>
> Senate Report No. 2013, 85th Congress, 2nd Sess., reprinted at 2 *U.S.C. Cong. and Admin. News* (1958) 3891, 3893.

By providing for delegation of a larger part of the sentencing decision to a single Parole Board, Congress has provided a vehicle for achieving more uniform prison terms than could be achieved by the independent sentencing decisions of many judges in many districts. Thus, it would be clearly contrary to the legislative purpose of the (a)(2) sentence if hundreds of judges were authorized to overrule the decisions of the Parole Board which failed to "comply" with their individual sentencing intentions.

In February, 1976 Rothwell appeared before a Hearing Examiner Panel. This appearance was six months after commencement of incarceration thus enabling Rothwell to demonstrate his institutional performance. At this in-person hearing the Panel considered all relevant factors including his past history, salient factor score and institutional performance and adjustment. The Parole Board, upon consideration of all the facts, determined that a decision outside of the guidelines was not warranted and therefore continued Rothwell to a point equal to one-third of his sentence.

One main point of the petition filed in District Court is the allegation that there was no serious consideration given to Rothwell's institutional progress. As the Board's guidelines illustrate, there are three principal types of factors considered by the Board in making parole decisions: the severity of the offense committed, the offender's personal background, and the performance of the offender while in prison. The general parole statute, 18

U.S.C. § 4203(a) describes the Board's function in terms of the first two factors:

> If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is reasonable possibility that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize release of such prisoner on parole.

Institutional adjustment is mentioned in the one-third eligibility statute, 18 U.S.C. Section 4020; but merely as a condition precedent to parole eligibility, not as a factor to be weighed in deciding whether to parole an eligible prisoner:

> A federal prisoner . . . whose record shows that he has observed the rules of the institution where he is confined, may be released on parole after serving one-third of such term or terms . . .

Thus, the Board does not consider institutional performance as the key factor in parole decision making. The paroling policy guidelines set out the usual range of time to be served by balancing the severity of the offense committed and the parole prognosis of the prisoners. *See* 28 C.F.R. Section 2.20. The guideline ranges established by this method are based on a presumption of good institutional performance and program progress. Exceptionally good or bad institutional performance is recognized as a reason for making a release decision below or above the usual range of time to be served. *See* 28 C.F.R. 2.20(c). In recognition of cases of exceptional institutional performance the Board's regulations speci-

fically invite institutional officials to petition for early reconsideration of cases when they feel that it is warranted. 28 C.F.R. § 2.15.

In summary, the Board's procedure for consideration of cases under Section 4208(a)(2) provides for an initial evaluation of the cases in accordance with policy guidelines and a subsequent review to determine whether exceptional institutional performance warrants a different disposition. In this way the Board accomplishes the disparity-reducing goals of 4208(a)(2) while retaining the flexibility to make exception for individual cases, where warranted. Judicial review of the discretionary decisions of the Board would frustrate the disparity-reducing purpose of 4208(a)(2) by increasing the number of authorities making parole release decisions.

III.

Title 18 U.S.C. § 4208(a)(2) is an early consideration provision and not an early release provision.

The appellant raises the instant appeal with the misconception that 18 U.S.C. § 4208(a)(2) is an early release provision. This is made quite clear when he states:

> At the time of the Appellant's sentencing, the Parole Board followed a procedure which would have resulted with the Appellant serving one third or less of his sentence under that provision of the penal code. Brief of Appellant at 1.

The argument that appellant's "a-2" sentence entitled him to release prior to one-third of his sentence completely misinterprets the purpose and function of an "a-2" sentence. Rothwell has equated his frustrated hopes with

the judge's sentencing intentions. This confusion of issues was recognized and addressed in the recent case of *Kramer* v. *United States*, 409 F. Supp. 1402 (N.D. Ga. 1976).

> Petitioner is not entitled to early release simply because he is an "A-2" prisoner whose institutional performance has been good. The guidelines presume, and were established specifically for, cases with good institutional adjustment and program progress. 28 C.F.R. § 2.20(b). Once again, it must be stressed that § 4208(a)(2) is an early *consideration* provision, not an early *release* provision; and the sentencing judge's use of such provision does not in any way reflect upon his view of the severity of the offense. Early release for the "A-2" prisoner is no less dependent on "exceptionally good institutional program achievement" than it is for prisoners serving "straight" sentences. *Id.* at 1404.

In denying a motion to vacate sentence the Court in *Kramer* held that the guidelines themselves do not operate to deprive an "a-2" prisoner of meaningful consideration for parole release.[12]

In the instant appeal the facts clearly establish that Rothwell was afforded meaningful parole consideration. The term, meaningful parole consideration" first surfaced in *Garafola* v. *Benson*, 505 F.2d 1212 (7th Cir. 1974). That case discussed the alleged inequity involved in the

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[12] It should be noted that Chief Judge Edenfield relied in part on the opinion in *United States* v. *Silverman*, 406 F. Supp. 862 (D.N.J. 1975), in deciding the *Kramer* case. He did so with the knowledge that an appeal was pending in *Silverman*. On July 15, 1976 the Third Circuit reversed the District Court in *Silverman, sub. nom. United States* v. *Salerno*, 538 F.2d 1005 (3d Cir. 1976).

then prevailing Parole Board practice whereby 18 U.S.C. § 4202 prisoners were entitled to in-person parole hearings at the one-third point of their sentences, while § 4208 (a)(2) prisoners were afforded only file review at the one-third point. The Court in *Garafola* concluded that a polimy of in-person appearances at the one-third point for all prisoners could rectify the alleged disparate treatment.[13] Rothwell, however, was provided his required in-person hearing. In the vernacular of disappointed prisoners, deprivation of "meaningful parole consideration" has become a euphemism for denial of parole. The court below was without jurisdiction to review the substance and wisdom of a Parole Board decision to deny parole. *Bradley* v. *United States*, 410 U.S. 605, 611 (1973).

IV.

The application of parole guidelines promulgated subsequent to appellant's sentence does not mandate resentencing.

In the instant appeal Rothwell places reliance on the cases of *United States* v. *Slutsky*, 514 F.2d 1222 (2d Cir. 1975) and *Kortness* v. *United States*, 514 F.2d 167 (8th Cir. 1975), for the proposition that the application of

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[13] It is noteworthy that other courts of appeals which considered the Board's "(a)(2)" practices have reached results different from that of the Seventh Circuit in *Garafola*. The cases include: *Grasso* v. *Norton*, 520 F.2d 27 (2d Cir. 1975); *Stroud* v. *Weger*, 380 F. Supp. 897 (M.D. Pa. 1974), and *Moody* v. *Board of Parole*, 390 F. Supp. 1403 (N.D. Ga. 1974), *aff'd* 502 F.2d 1165 (5th Cir. 1974). Nevertheless, the Board of Parole has amended its regulations to routinely provide the type of hearings required by *Garafola*. 28 C.F.R. § 2.14(b), as amended, 40 Fed. Reg. 41322 (Sept. 5, 1975).

parole guidelines, promulgated subsequent to his sentencing, requires his resentencing.

In *Slutsky*, *supra*, the petitioners appealed a denial of a timely motion under Rule 35, Fed.R.Crim.P. The petitioners, who were serving sentences under § 4208(a)(2), were given a parole hearing after three months of confinement and then continued to the expiration of their sentences. This Court found that this procedure was a denial of meaningful parole consideration and, therefore, inconsistent with the expectations of the sentencing judge. In relying on the decision in *Garafola* v. *Benson*, 505 F.2d 1212 (7th Cir. 1974), this Court found that an initial hearing of an "(a)(2)" prisoner within a few months of commencement of sentence with continuation to demonstrate good institutional performance thereby denying meaningful consideration for parole. The Court stated its concern that § 4208(a)(2) prisoners should be given the same opportunity to demonstrate readiness for parole as § 4202 prisoners who are entitled to an in-person hearing at the one-third point of their sentences. However the issue which concerned the Second Circuit in *Slutsky* is not present in the instant case.[14] Rothwell was afforded his first hearing six months after incarceration and at a time where he would be able to demonstrate good institutional performance to the Board. Again, contrary to the facts in *Slutsky*, Rothwell was continued to a point equal to one-third of his sentence. In no way did he receive any less opportunity to demonstrate rehabilitation than would a prisoner under a § 4202 sentence. To the contrary, Rothwell was afforded greater

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[14] As indicated in note 13, *supra*, the United States Parole Board (now Parole Commission), has adopted the standard set forth in *Garafola* v. *Benson*, *supra*, to provide for the type of hearings that were lacking in *Slutsky*, *supra*. 28 C.F.R. § 2.14(b), as amended 40 Fed. Reg. 41332 (Sept. 5, 1975).

opportunity to demonstrate his good institutional performance and rehabilitation.

The appellant's brief misinterprets the decision in *Kortness* v. *United States*, *supra*. In *Kortness*, the petitioner had been given his initial parole hearing after only two months of incarceration. The Board denied parole and continued the prisoner to expiration of his sentence. The Eighth Circuit found that the prisoner had been denied meaningful consideration for parole at an early date contrary to the intentions of the sentencing judge. Since the decision in *Kortness*, many courts have cited *Kortness* for propositions well outside the intended boundaries of the opinion. The Eighth Circuit's awareness of this alarming use of its opinion has caused it to modify and clarify the *Kortness* decision in *United States* v. *White*, 540 F.2d 409 (8th Cir. 1976). The government's position in *White* was that:

> . . . district courts have been interpreting *Kortness* as authorizing the sentencing judge to exercise continuing authority and jurisdiction to modify or reduce the sentence when the district Court disagrees with the action of the Parole Board with respect to a particular prisoner. *Id.* at 411.

In light of this treatment of the *Kortness* decision, the Eighth Circuit set forth the limitation they intended *Kortness* to have.

> Of course, the *Kortness* decision is a limited one and does not give sentencing judges the authority to supervise, control, or second-guess the Parole Board. But the doctrine of *Kortness* does permit the district court to correct a sentencing error where the import of the judge's sentence has in fact been changed by guidelines adopted by the

> Parole Board contemporaneous with or subsequent to the imposition of that sentence. *Id.* at 411.

The term "sentencing error" used by the *White* court is critical in considering the instant appeal. Rothwell proposes that the mere fact that the sentencing judge was not aware of the parole guidelines at the time of sentence is sufficient to establish a "sentencing error". However, the Eighth Circuit has ruled otherwise in their modification of the *Kortness* decision.

> We intended to make clear in *Kortness* by our citation of *Garafola* v. *Benson*, 505 F.2d 1212, 1217-18 (7th Cir. 1974), that a district judge's expectations with regard to an (a)(2) sentence *are not thwarted* provided that the prisoner receives meaningful consideration for parole 'at least upon completion of one-third of his sentence'. (emphasis added) Id. at 411.

In the instant case Rothwell has received the meaningful consideration required by both *Garafola, supra* and *Kortness, supra.* The §4208(a)(2) sentence is designed to provide the Parole Board with the greatest discretion with regard to parole. The use of parole guidelines is well within that discretion. Neither *Slutsky, supra* nor *Kortness, supra* found that the parole guidelines were in any way improper; rather those courts point out the need for sentencing courts to be aware of the guidelines in relation to the court's expections regarding the opportunity for meaningful consideration for parole. The clear implication of these cases is that it is permissible for the Parole Board to use its guidelines in (a)(2) cases. Moreover, every court which has directly ruled on the propriety of the Board's guidelines has upheld them as a legitimate aid in the exercise of the Board's broad statutory discretion. *See, e.g., Battle* v. *Norton*, 385 F.Supp. 925 (D. Conn. 1973); *Wiley* v. *Board of Parole*, 380 F.Supp. 1194 (M.D.Pa. 1974).

In the case of *Jacobson* v. *United States*, 542 F.2d 725 (8th Cir. 1976), the Eight Circuit recognized the unintended effect their decision in *Kortness* v. *United States*, *supra*, has had on §2255 motions.

> The *Kortness* decision has given rise to a flood of pro se § 2255 motions wherein the prisoner alleges that he has been denied meaningful parole consideration, in essence attacking the validity of the Board's decision. *Jacobson* v. *United States*, *supra*, at 727.

The Court then went on to reaffirm its holding in *United States* v. *White*, *supra*, that *Kortness* was only intended to permit the district court to correct a sentencing error where the intentions of the sentencing judge had, in fact, been defeated by guidelines adopted by the Parole Board contemporaneous with or subsequent to the imposition of that sentence.

Chief Judge Clarie has made clear in his Ruling on Petitioner's Motion to Correct Sentence that he intended to delegate to the Parole Board, with the use of §4208 (a)(2), the maximum discretion and that "(n)othing in the Parole Board's action in exercising its discretion runs contrary to this Court's original intention." Appellant's Appendix at .....

Rothwell's reliance on *United States* v. *Salerno*, *supra*, is misplaced in light of the Third Circuit's recent ruling in *United States* v. *Somers*, — F.2d — (3rd Cir. 1977), 20 Crim.L.Rep. 2545 Mar. 30, 1977. In *Somers* the Court held that the sentencing judge's statement of his intent at time of sentencing is conclusive on the issue of whether his intent was thwarted by the implementation of the parole board guidelines.

> As we read Silverman I and II, it is the intent and expectation of the district court judge who

> sentences under §5208(a)(2) which are controlling and which must be searched out to determine if relief may be ordered under 28 U.S.C. §2255. In our judgment, there can be no better evidence of a sentencing judge's expectations or intent than his own statement of those facts. 20 Crim.L.Rep. at 2546.

The Third Circuit's reaffirmation of its narrow holding in *United States* v. *Silverman, supra*, recognizes the position taken by this Court in *D'Allesandro* v. *United States*, 517 F.2d 429 (2d Cir. 1975), that the sentencing courts are not to act as super parole boards. In light of the sentencing judge's statements the government respectfully submits that the Parole Board's use of parole guidelines in deciding whether to parole the appellant neither frustrated Judge Clarie's intentions nor created any sentencing error.

CONCLUSION

The government, for the reasons submitted, respectfully urges that the District Court properly denied and dismissed the appellant's motion to correct sentence. Its ruling should therefore be sustained.

Respectfully submitted,

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GOVERNMENT'S APPENDIX

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Ruling on Petitioner's Motion to Correct Sentence

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H-76-295

JOHN ROTHWELL

—vs—

UNITED STATES OF AMERICA

The petitioner, a federal prisoner, was found guilty after a jury trial in this Court, on Counts 9 and 10 for the possession and distribution of cocaine in violation of 21 U.S.C. § 841(a)(1) and on Count 11 for conspiracy to possess and distribute said drug under 21 U.S.C. § 846. He was sentenced in this Court on April 3, 1973, to serve four years on each of the three counts, said counts to be served concurrently, pursuant to 18 U.S.C. § 4208 (a)(2). He appealed his conviction ultimately to the United States Supreme Court, where it was affirmed and the Court's mandate, dated February 19, 1974, was filed with the Clerk of this Court on April 5, 1974. Through a clerical oversight, however, the Clerk failed to notify the United States Marshal's Office, and he did not actually enter federal custody until August 28, 1975, more than a year after the Supreme Court denied his appeal. The respondent has moved to dismiss the petition for lack of jurisdiction.

The petitioner now represents that subsequent to his sentencing, the Parole Board adopted a new guideline policy, which changed the criteria, upon which parole was

to be considered. He states that the sentencing judge could not have had any knowledge of these guidelines, because they were not in use at the time of his sentencing. He also complains that other defendants involved in his crime are not now incarcerated. However, it must be borne in mind that defendant Catalano received a three-year sentence, which was served; and the other two defendants, Holmes and Fox, were sentenced to two years, suspended after four months. The petitioner was proven to be the supplier and source of cocaine for the others and traded in substantially large quantities. The two-year delay in processing his appeal and the late commencement of his sentence were other factors which explain the reason for his continued incarceration.

On February 9, 1976, petitioner was given a parole hearing before the Hearing Examiner Panel at Allenwood, Pennsylvania, and that hearing was continued to a time equal to one-third of his sentence. Thereafter, on July 29, 1976, the present action was filed in Court.

When this Court imposed the § 4208(a)(2) sentence, it intended to give to the Parole Board (now the Parole Commission) complete discretion under the law to decide, when the petitioner should be released. The Court contemplated no second guesses on the exercise of this delegated discretion. As the Second Circuit Court of Appeals recently spelled out:

> "The district court has no power to substitute its own discretion for that of the Board. If the court has found that the Board has abused its discretion, it may remand the case to the Board with instructions for correction." *Billieri* v. *United States Board of Parole*, Civ. Docket No. 75-6120 (2d Cir. Aug. 30, 1976), Slip Op. at 5297.

Ruling on Petitioner's Motion to Correct Sentence

The foregoing principle is further substantiated in *Tarlton* v. *Clark*, 441 F.2d 384, 385 (5th Cir. 1971):

> "By the language of Title 18 U.S.C.A. § 4203, the Board of Parole is given absolute discretion in matters of parole. The courts are without power to grant a parole or to determine judicially eligibility for parole. United States v. Frederick, 405 F.2d 129 (3rd Cir. 1968). Furthermore, it is not the function of the court to review the discretion of the Board in the denial of application for parole or to review the credibility of reports and information received by the Board in making its determination."

Also see Thompkins v. *United States Board of Parole*, 427 F.2d 222 (5th Cir. 1970); *Kramer* v. *United States*, 407 F. Supp. 1402 (N.D. Ga. 1976).

Nothing in the Parole Board's action in exercising its discretion runs contrary to this Court's original intention. It is not the Court's prerogative to second-guess the Parole Board. They decided that a decision outside the parole guidelines was not warranted, a discretion which the Court intentionally vested in them at time of sentencing. It is not unusual for the Court to impose sentences in similar criminal activity to six, seven or eight years, depending upon the circumstances and overall record. In light of this petitioner's military record, the Court granted his every reasonable consideration. The Parole Board's action has not denied him meaningful consideration.

Under Rule 35, Fed. R. Crim. P., entitled "Correction or Reduction of Sentence," the Court is autohrized to

> "reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review . . . ."

Jurisdiction under this Rule has passed and the Court is without authority to act. Furthermore, if the Court had such jurisdiction and authority, it would deny the petition on the present record and papers. The Court finds that Rothwell has been treated fairly and justly, both by the Court and the Parole Board.

There has been no sentencing error here. The petition is accordingly denied and dismissed. SO ORDERED.

Dated at Hartford, Connecticut, this 1st day of October, 1976.

/s/ T. EMMET CLARIE
T. EMMET CLARIE
Chief Judge

★ U. S. Government Printing Office 1977—714—020—ACT—206

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-2157

JOHN ROTHWELL
Appellant

v.

UNITED STATES OF AMERICA
Appellee

AFFIDAVIT OF SERVICE BY MAIL

Stephen Zedalis, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 47-19 194th Street Flushing, N.Y.

That on the 14th day of April, 1977, deponent served the within Brief and Appendix upon John Rothwell, Pro Se P.O. Box 1000 Montgomery, PA 17752

Attorney(s) for the Appellant Pro Se in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Stephen Zedalis

Sworn to before me,

This 14th day of April 1977

SHIRLEY ANSKER
Notary Public, State of New York
No. 24-[illegible]AM4502766
Commission Ex[illegible]s March 30, 1979